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STATE LEGISLATION REGULATING RAILROAD TRAFFIC.

THE question of the power of a state to regulate rates of fare and freight on the railroads within her limits has passed from the region of doubtful into that of settled law. The state cannot barter away the police powers which she holds for the general security and welfare of her citizens, merely by giving to a corporation chartered power to establish rates of toll for itself; and the exercise by the legislature of its paramount right to prescribe rates, does not violate any contract with the corporation. Such, at least, is the doctrine of the famous *Granger Cases*, 4 Otto; such the conclusion of Judge REDFIELD, an authority on railroad law (27 Vermont 140), and of other authority unnecessary here to cite. It follows then that a review of the American law on the subject of state regulation of railroads, either through the medium of railroad commissions or by direct enactments, entails the examination and comparison of statutes rather than the collation of authorities. Such a review it is proposed to make, very briefly, in this article. The "railroad question" is not strictly a legal one, and, except incidentally, any discussion of it will not be attempted.

The chief grievances, or problems rather, which go to make up the railroad question and which legislation has been invoked to remedy may be ranged under two heads—extortion and discrimination. Extortion includes the charging of rates higher than reasonable or higher than necessary to afford the railroad company a fair

return on its capital, and the combination by two or more companies to raise rates, or the pooling of earnings and dividing them according to an agreed proportion, by several competing lines, that high rates may be maintained. Discrimination may be against localities—usually by charging higher rates from and to non-competing than competing points, or by charging more for short distance local than for long distance through freights, or against persons by affording one shipper or one connecting line lower rates or better facilities than another. This, of course, is the extreme anti-railroad view.

Special methods on the part of government for dealing with such practices fall more or less exactly under one or another of three systems.

1. The system of the Western states—stringent and minute regulation of tolls by means of statutory enactments. There may or may not be a railroad commission.

2. The English system of a commission with almost judicial powers, to hear and decide each complaint on its own merits.

3. The Massachusetts system of a commission, whose function it is to investigate and report to some department of the government.

Some remarks on the general nature and powers of railroad commissions, which play so prominent a part in most systems of railroad law, are appropriate.

A railroad commission is usually appointed by the governor, alone or with the approval of the legislature. In some states the seeds of evil have been sown in making the office an elective one. Some railroad commissions consist of one member only; the usual number is three. The term of office is commonly three years, but varies from one to six years. No person in railroad employment or holding railroad stock is eligible. The commissioners exercise a supervision of all railroads and other transportation companies within the state, investigate accidents, notify the companies of such changes in rolling stock, buildings, road and methods of management as they deem proper for the safety and comfort of the public, and inquire into their financial condition. The companies must make annual reports of their business, assets, etc.

The commissioners have authority to require of any railroad official information touching his road, to inspect any railroad property, to examine stock lists and other books and papers, and to

employ experts to aid in their investigations. They may summon witnesses and administer oaths. They are entitled to free passes when travelling on official business. Their salaries and expenses are usually defrayed by the companies, either in proportion to the latter's gross receipts or their length of road, or the relative time which the commission has been obliged to devote to them. Most acts contain a proviso that no request or advice of the board shall impair or affect the legal obligations and liabilities of the corporations.

The board must make a yearly or biennial report to some specified department of the state government, usually the executive, giving the results of their labors and embodying any recommendations they desire to make, and special reports when necessary. They have power, in many states, on application of a one-fiftieth interest, or of a director, to make a thorough examination of the financial condition of a railroad and to publish the results in the newspapers.

The remedies at the command of the board, varying in different states and according to the emergency, are a report to the governor, legislature, or judicial officers of the state, a suit by the attorney-general or a county attorney at the commissioners' instance, or a direct application by the commissioners to the courts for an injunction.[1]

The first railroad commission law was that of Connecticut, of 1849, under which three commissioners for each railroad in the state were to be appointed, whose duty it was "carefully to examine the whole of the road and to see that the corporation faithfully complies with the laws of this state and with the provisions of its charter." Now all the New England states have railroad commissions upon a nearly uniform plan. That of Massachusetts, created in 1869, is the best known, partly from the high reputation of some of its members. The act resembles the Vermont act of 1855. The Massachusetts commission has prescribed a uniform method of keeping accounts for all the corporations under its supervision. If we are not mistaken, the same method is followed by the railroads of New England and of New York.

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[1] In *McCoy* v. *C. I., St. L. & C. Railroad Co.*, 22 Am. Law Reg., U. S. 725, the United States Circuit Court in Ohio, considered the question of the jurisdiction of Courts of Equity to compel railroads to discharge the duties imposed upon them by law. As will be seen in the course of the present article, this jurisdiction is also conferred, to a greater or less extent, by statute in many states. It is likely that mandatory injunctions will yet play an important part in railroad regulation.

As regards direct legislative regulation of rates—in Massachusetts, railroads are expressly allowed to make and alter their own rates, subject to a power of revisal in the general court. There is a law, however, giving the railroad commissioners power to cause to be established a fair proportion between the rates for carriage of milk in large and small quantities. A Connecticut law prohibits discrimination by a railroad between other connecting roads, and another of the same kind has reference to the milk traffic. New Hampshire goes farthest, requiring schedules of tolls to be published by the railroads, changeable only after thirty days' notice, and forbidding, by statute in 1879, higher rates by the car load for short distances than for long. In general, however, what Mr. C. F. Adams, himself a member of the first Massachusetts commission, says of his own state, in a little work on the Railroad Problem, is true of the rest of New England. "In the Massachusetts act the fundamental idea was publicity, the commission represented public opinion. * * * The only appeal provided was to publicity. The board of commissioners was set up as a sort of lens by means of which the otherwise scattered rays of public opinion could be concentrated to a focus and brought to bear upon a given point. The commissioners had to listen and they might investigate and report, they could do little more."

The Virginia act of 1876 is somewhat different from those of New England. The railroad commissioner seems to be to some extent the agent of the Board of Public Works. If a railroad, after written notice from the commissioner, continues to violate the laws or its charter, or does not heed his monition in such matters as repairs or changes in the conduct of the road, he reports to the Board of Public Works, which may authorize him to apply for an injunction. This Virginia law seems to afford a more direct and speedy remedy for abuses than those we have considered.

By the same act, discriminations based on difference of distance, and preferences and advantages to one shipper over another are forbidden, and the effort is made to prevent higher charges for freights coming into the state than for like freights passing through the state, and these provisions may be enjoined by injunction.

In contrast with the New England system of railroad law is that of the West, taking its key-note from the well-known Granger movement several years ago. In the matter of railroad abuses, no

region has felt the shoe pinch more than has the portion of the West traversed by the great trunk line systems. A few cents fluctuation in grain rates made all the difference to the farmers between a good and a losing year. Several states, about 1871, passed laws almost amusing in their severity. Illinois set up a tariff of charges, any departure from which incurred a penalty of $1000; and where the violation was wilful, proceedings were to be taken for the forfeiture of the company's franchises. In Iowa, the governor, on the recommendation of twenty taxpayers of the county where the suit was brought, might devote state funds in aid of proceedings against railroads for illegal rates; and the offending corporation was confronted with quintuple damages, costs and an attorney fee in every court to which the case was taken.

In Minnesota, a rigid per ton per mile system of charges was sought to be enforced by a penalty of $1000, or forfeiture of corporate franchises, at the discretion of the court. In Wisconsin, the law of 1874 divided railroads into several classes, and prescribed the maximum rates chargeable by each class under penalty of treble damages, fine and loss of compensation, jurisdiction of the act being extended to justices of the peace. Although these statutes have been repealed—that of Illinois was declared unconstitutional in *C. & A. Railroad Co.* v. *The People*, 67 Ill. 11—the laws which replace them are still severe. These four states now have railroad commissions. The Illinois commission, which existed under the Granger Act of 1871, has extensive powers. Its principal duty seems to be that of ferreting out violations of the laws against railroad extortion and discrimination. The statute definition of these offences is so exhaustive as to provide against almost every possible evasion. The punishment for violation is a penalty of from $1000 to $2500, besides treble damages, costs and attorney fees. Actions in these cases take precedence of all but criminal business. The commissioners make and publish a schedule of rates which they may revise and alter at discretion. A departure from these rates on the part of a corporation is *prima facie* evidence of extortion. The attorney-general and the county attorneys are to bring suit at the commissioners' instance, besides the private remedy of the injured party. The existing laws of Minnesota and Wisconsin are also strict, those of Iowa less so, perhaps, but their railroad commissions have little direct power, being nearer the Massachusetts plan. The Missouri commission classifies freights and regulates

tariffs. No state goes further than Ohio in the matter of voluminous and minute railroad legislation. Of the western states east of the Missouri river, Indiana, Kentucky and Tennessee alone appear to be without special railroad legislation governing rates of toll. In the others, including at least one of the Pacific states, California, the amount of *itemized*—if we may use the term—railroad law is remarkable. Page after page of most statute books are taken up with classifications and tariffs of freight or with forms for the annual returns, showing extent of business, description of rolling stock, salaries of officers, in short, a complete exhibit of their condition, which the companies have to render. This requiring of railroad returns according to a prescribed schedule obtains in other than the Western states, however—New York has had such a law since 1850.

Mr. Joseph Nimmo, Jr., of the U. S. Bureau of Statistics, in his report for 1879, on the Internal Commerce of the United States, thus speaks of the results of the Granger legislation: "Experience has proved that certain of the restrictive measures adopted a few years ago by the legislatures of some of the Western states were in their practical workings detrimental to the producing and commercial interests of the country, and at the same time injurious to the railroad interests. Nevertheless, the legislative acts regulating freight charges which have been adopted in this country have generally had a salutary influence as reformatory measures. The benefits of such acts have resulted rather from their moral influence in restraining and preventing abuses than from their direct effect in enforcing the right and correcting the wrong. The railroad companies have been constrained to explain the principles upon which their freight tariffs are based, and thus the public have been enabled to gain much valuable information as to the distinction which exists between just and unjust discriminations, and between practices which are based upon economic considerations and sound commercial principles and such as are indefensible and therefore constitute abuses of the rights and privileges conferred upon the companies."

Some quite recent legislation next demands consideration. And first, Kansas has this year (1883) replaced by a new law her system of maximum per ton per mile rates. No higher rate is to be demanded of one person than another for a like service, nor a higher rate from any given point than amounts to a fair proportion of the charge from another given point. This section is almost the coun-

terpart of one in the Iowa statute book. The provisions as to penalties and damages resemble those in other Western states. Pooling contracts are forbidden under a penalty of $5000 for each month the law is violated. There is a board of railroad commissioners who are, upon complaint to them, to certify what is a reasonable charge in the particular case and for the company then to exceed that rate is *prima facie* evidence of extortion. This statute, though in some respects relaxed from the Granger severity, shows little advance upon the present laws of other Western states, enacted some years before it. To forbid pooling, for instance, is to deny the truth now well understood, that these associations are formed not to enrich the parties to them but to prevent their ruin through competition.

The adjoining state of Nebraska has an act of 1881 regulating tariffs according to the schedules in force in the year 1880. There is no commission. The efforts of the state seem directed mainly towards keeping under scrutiny the lines traversing her territory. Each railroad passing through the state must have an office therein, where must be kept open to public inspection the stock list, table of assets, names of officers of the company and other like items, under pain of forfeiture of the right to do business in the state, the road being put into the hands of a receiver.

Besides Virginia, already noticed, and West Virginia, which has laws dating from 1874, of the thorough-going Granger type, but no commission, only three Southern states have laws relating to the present subject of inquiry.

In South Carolina, under an act in 1882, there is one railroad commissioner. His only direct control of rates is in the case of pooling contracts, which must be submitted for his approval. To *receive* as well as to allow a rebate on freights is prohibited among other forms of illegal discrimination. (This illustrates the impracticableness of some railroad laws and the difficulty of the subject. Rebates and special rates are often most iniquitous; but how can A. be prevented from accepting better rates than B. if the railroad chooses to give him the opportunity? An English decision cited farther on lays down a better rule.) No higher rate may be charged for short than for long distances, except that the law is not to be so construed as to require a "corporation or combination of corporations to regulate their charges for short distances by their proportion of through rates between terminal or junctional competitive

points." Railroads must post their tariff schedules in their stations and give notice of intended changes. The commissioner has authority in case of violation of law by a railroad, especially in matters relating to connections with other roads, time schedules, and rates of toll, after giving the company written notice, to apply to court for an injunction restraining it from continuing to violate the law or its charter. Actions for the penalties given by the statute may be brought by the attorney-general at the commissioner's request; and if a railroad repeatedly and wilfully violates the law, or judgment is had against it or penalties are recovered against it under the act more than once, the commissioner may, if he think it consistent with the public interest, instruct the attorney-general to proceed for the forfeiture of its franchises. This forfeiture clause differs from that in the Illinois law of 1871. That statute was declared unconstitutional (67 Ill. 11), on the ground that it denounced so extreme a penalty as forfeiture against discrimination, not against discrimination proved to be unjust, and because this ultimate penalty was directed against a first offence. This decision was perhaps kept in view in framing the South Carolina act.[1] A clause in the West Virginia act which has been alluded to, makes forfeiture the penalty for a wilful violation of its provisions, every violation to be held wilful until the contrary is proved.

The Georgia act of 1879 differs from all others in reposing larger powers in her commissioners. Not dwelling upon the ordinary superintendence which forms so large a part of a commissioners' duties, it first prohibits extortion and unjust discrimination in general terms, and then makes it the duty of the commissioners to fix tariffs of freight, rules against rebates and so on, allowing, however, reduced through rates on freights going beyond the state or coming into it from without. The determination of what are reason able rates rests in all cases with the commissioners. The commissioners are from time to time to revise and amend the schedules

[1] A bill has recently passed both branches of the South Carolina Legislature, requiring railroads to submit rates to the commissioner for approval or modification. From the commissioner an appeal lies to the courts, to whom the evidence taken before the commissioner is submitted, and who must decide the case within ten days, this decision to be final. This is a new instance of the tendency, remarked upon further on, of the newest legislation, to bring matters of railroad regulation under control of the courts.

which they have fixed, and these schedules are to be published for a certain period in the newspapers, and are to be taken as conclusive evidence of a reasonable and proper charge. All contracts between railroads must have the commissioners' approval. Violations of the act are punishable by a penalty of $1000 to $5000 upon suit by the commissioners through the attorney-general.

The history of this act furnishes the only instance, so far as known, in which the constitutionality of a Railroad Commission has been tested. *Tilley* v. *The Savannah, Florida and Western Railroad*, 5 Fed. Rep. 641, was an application for an injunction to restrain the Georgia Railroad Commission from the performance of its functions in fixing and enforcing certain tariffs of rates. The suit was in the United States Circuit Court. The complainant, a stockholder of the railroad company, urged, *inter alia*, that the rates fixed by the commissioners under the Act of 1879 were too low to enable the company to earn its interest and dividend; that the regulation of tariffs sanctioned by the act amounted really to a taking of property for public use without compensation; that to allow the commissioners' tariffs to be sufficient evidence of a reasonable rate was to take away the right of trial by jury; that if the legislature had this power to regulate toll, it could not delegate it to a commission. But WOODS, Cir. J., held, that an act to regulate rates could in no sense be considered a taking or damaging of private property without compensation; that in making the rates fixed by the commissioners conclusive evidence of what a reasonable rate was, the legislature was but prescribing the effect of evidence, a prerogative exercised by all legislative bodies; that under the familiar principle that the grant of the right to do a certain thing carried with it the means to accomplish the end, it was competent for the legislature to delegate its authority to fix reasonable rates to a commission, the true distinction being between the delegation of power to make law and the conferring authority or discretion as to its execution. The bill was accordingly dismissed.

The Alabama statute of 1881 opens by proclaiming the main track of a railway a public highway—an assertion often supposed to strike terror into tyrannical corporations, and to have in itself some magic power for settling at once and forever the intricacies of the railroad problem. The act shows care and consideration, however. It declares that any undue rate or any unjust discrimi-

nation between persons or localities on the part of a railroad is extortion. Whether a given case amounts to extortion is in all cases for a jury to decide. No charge can be held extortionate if it appear that on the basis of such charges the company cannot more than make a fair return on its capital.

A remark may be permitted at this point. Provisions resembling the foregoing may be found in other codes, usually, as limiting the maximum a railroad shall be allowed to earn to a net ten per cent. on its capital; and such regulations have been claimed as sure guages by which to fix equitable standards of rates. Such tests are not invariably accurate, however. In the report before quoted, Mr. Nimmo says, "the governmental measures for the regulation of freight rates have had little reference if any to the cost of constructing or of operating railroads," to which may be added—or to the excess of expenses over profits during periods of loss and depression. The average of railroad dividends is said to fall far below ten per cent., with all the liberty as to charges which the companies may enjoy. There is no objection to the Alabama law in theory—its application must involve labor and difficulty. But to return to the act—if a railroad undertakes to grant drawbacks they must be equal. Special rates may be given in aid of the development of any industrial enterprise; but these special rates must be published as are others. This obviously just concession marks the progress in railroad legislation. The commissioners must consider all tariffs and give notice to the companies of such changes as seem advisable. If a railroad demands more than the rate thus fixed and suit is brought, the company is liable to a penalty and double damages, costs and attorney fees. On the other hand, although the commissioners' approval of a rate does not bar an action upon it for extortion, the plaintiff in such case, although successful, must pay the defendant its costs and an attorney fee.

A significant feature of the act is its instruction to the commissioners to seek to come to an agreement with the railroad commissioners, or other officers of the various states, as to a "draft of statutes to be submitted to the legislatures of the different states to secure such uniform control of railroad transportation in the different states, and from one state into or through another state, as will best subserve the interests of trade and commerce of the whole country." If such united action as is here contemplated could be arrived at it might have this advantage over any national regula-

tion of inter-state traffic, that in the former case, one system could be adopted for traffic in the states and between the states, whereas national action could only affect inter-state commerce.

We have now reviewed the New England and the Western systems of railroad regulation and its latest phase as exhibited in certain of the Southern states. None of the Middle states have railroad commissions, nor any special set of laws dealing with this branch of railroad management. There are some constitutional requirements in Pennsylvania, which the legislature has never acted upon.[1]

This sketch would not be complete without including the leading points in the railway system of Great Britain, the outcome of much discussion and many expedients. The Railway and Canal Traffic Act of 1854, requires that railways shall afford "reasonable facilities for traffic, and shall give no undue or unreasonable preference." Upon application of a party injured, the court may issue an injunction enforceable by attachment against officers of the corporation and by a money penalty. As an example of how this act has been interpreted, it was held in *Nicholson* v. *G. W. Railway*, 1 Nev. & Mac. 121, that the act did not forbid a railway entering into an agreement securing advantages to particular individuals if it has in view only the legitimate profit of the stockholders, and is willing to afford the same facilities to all parties upon similar terms; with these objects and under these modifications, discrimination is not illegal.

By the Regulation of Railways Act of 1873, a board of three commissioners, removable only for cause, is created. The railways must publish books of rates. All complaints as to rates, and indeed, any difference to which a railway is party are referable to the commissioners. They may fix terminal charges, decide on the reasonableness of through rates, and, subject to the approval of the Lord Chancellor, make general orders regulating matters under their jurisdiction. No arrangement between companies relative to traffic or rates can be entered into without their sanction. The

[1] Since this article was written, there has been published a statute of Pennsylvania, passed in June 1883, forbidding undue discrimination and directing that concessions in rates and drawbacks shall be allowed to all alike upon like conditions in similar circumstances and during the same period of time. Any violation of this provision makes the offending party liable in treble damages. There is no special mode of enforcement of the act, and except as to the quantum of damages, it is but declaratory of the common law.

commissioners' orders may be made a rule of court enforceable by injunction. On matters of law an appeal lies from the commissioners to the courts, by a case stated. On matters of fact their decision is final: *Denaby Colliery Co.* v. *Railway*, 3 Nev. & Mac. 439. When sitting as a court they have power to punish for contempt. The English railway commission is really a court having cognisance of matters pertaining to traffic on railways. It does not exercise the functions of our commissions to investigate accidents, provide for the safety of the travelling public, and supervise the financial standing of the railways; all of which is done by the board of trade through inspectors.

A review of railroad regulation in the United States shows that no solution of this perplexing problem has been attained. All is yet in a transition state. From an inflexible system of repression the western legislatures have come to recognise the truth that there must and fairly may be certain inequalities in rates. Even to substitute "unjust discrimination" for "discrimination," in the wording of a statute indicates a change in the theory of railroad legislation. Still, as has been seen, even the latest western laws deviate little from granger principles.

The recent enactments in the south, especially in Georgia and Alabama, show a progress. In them, the hostility to corporations so characteristic of the western laws, and which it must be admitted is not without its excuse, is less prominent. Instead of making a statute the only criterion of such offences as extortion and illegal discrimination, the question is left to the decision of some tribunal, be it court or commission, upon the particular case. The principle is further admitted that in obedience to the necessary laws and usages of trade certain inequalities and fluctuations in charges cannot be avoided. The importance of public opinion is realized. And yet the principle of *regulation* is never let go. Judging from the latest statutes, the drift is not at all in the direction of letting the railroads alone.

So far, the expedients which seem to promise most for the future are boards of railroad commissioners, who shall be students as well as supervisors of the railroad system, and a judicious extension of the equity jurisdiction of the courts, especially in the line of mandatory injunctions. Not but that there is a good deal of virtue in the principles of the common law of carriers, even what is left of it, for dealing with railroad abuses; but its mode of operation, its

delay and the kind and amount of compensation it tenders, make it of little use.

If the railroad problem is in a transition state, the fact has an important bearing upon a question much agitated, and to which some paragraphs of the last presidential message are devoted—the question of a national control of inter-state traffic. Apparently, the point has not yet been reached where a satisfactory measure of the kind can be adopted. The utmost it would seem, which can safely be done, is the appointment of a carefully-selected commission, with powers quite limited save in the direction of investigation and report.

CHARLES CHAUNCEY SAVAGE.

RECENT ENGLISH DECISIONS.

House of Lords.

HUGHES *v.* PERCIVAL.

In the alteration or rebuilding of a house, involving the use of a party-wall, the law casts upon the owner the duty of seeing that reasonable care and skill is exercised to prevent injury to the adjoining property, and he cannot avoid responsibility by delegating the work to a third person.

A. employed a builder to tear down and rebuild his house. This involved the use of a party-wall between the properties of A. and B. and the rebuilding of a party-wall between the properties of A. and C. After the latter wall had been rebuilt, and the house nearly finished, the workmen of the builder, in fixing a staircase, without A.'s knowledge cut into the party-wall adjoining C.'s property, and so weakened it that A.'s house fell, dragging over the other party-wall and injuring B.'s property. This cutting was not authorized by the contract with the builder.

Held, that A. was liable to B. for the damage to the latter's house.

THIS was an action for negligence in taking down two houses standing on the defendant's land and erecting a new house, whereby the adjoining house of the plaintiff was injured.

The cause came on for trial at Westminster on the 3d and 4th of December 1880, before MANISTY, J., and a special jury, when the following facts were in substance detailed by the plaintiff's counsel in his opening address.

The defendant was the owner of a piece of land at the corner of Panton street and the Haymarket, upon which stood two old houses, Nos. 1 and 2 Panton street. The plaintiff was the owner